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In the Supreme Court of the United States

OCTOBER TERM 1984

MARTIN HECKMANN and EDWARD T. CAWLEY, individually and on behalf of Local 106, AFL-CIO, Service Employees International Union, a Labor Organization All Cemetery Workers and Members Thereof,

Petitioners,

vs.

CEMETERIES ASSOCIATION OF GREATER CHICAGO, et al; PEOPLE OF THE STATE OF ILLINOIS ex rel. NEIL F. HARTIGAN, Attorney General PC; and MERKAZ HARABONIM—CHICAGO ORTHODOX RABBINATE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

SIDNEY Z. KARASIK
100 West Monroe Street
Suite 911
Chicago, Illinois 60603
(312) 782-7295
Attorney for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

1. Whether government (via a State statute) may dictate the terms of a cemetery workers' collective bargaining agreement for the avowed purpose of insuring that members of a particular religious sect shall be permitted to bury their dead in accordance with their particular prescribed rituals?

2. Whether such governmental action, expressly designed to "accommodate" the religious needs of a particular minority, runs afoul of the Establishment and Free Exercise Clauses of the First Amendment (as embodied in the Fourteenth) by breaching the principle of *governmental neutrality* in matters of religion?

3. Whether a statute of Illinois which purports to outlaw a collective bargaining agreement understanding under which unionized cemetary workers perform no burials on Sundays or holidays (except in emergency circumstances) is preempted by the National Labor Relations Act, and whether the Illinois statute is within the compass of labor activities which a State *may not* regulate?

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REFERENCE TO REPORTS

The Opinion of the Appellate Court, First District, one justice dissenting, is reported in 127 Ill. App. 3d 451, 468 NE 2d 1354 (1st Dist. 1984) and is appended hereto as, App. 1 thru 11. The order of the Supreme Court of Illinois denying PETITION FOR LEAVE TO APPEAL appears at page App. 16.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District was entered on September 17, 1984. The dissenting opinion was entered October 15, 1984. The PETITION FOR LEAVE TO APPEAL was denied by the Supreme Court of Illinois on November 30, 1984. This PETITION FOR WRIT OF CERTIORARI was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1257 (3).

STATUTORY PROVISION FOR JURISDICTION

62 Stat 929, as amended, 28 USC §1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948 c 646, 62 Stat. 929."

STATUTES AND CONSTITUTION INVOLVED

Ill. Rev. Stats. 1983 ch. 21 par. 101 et seq.:

> 1. (a) Every contract, agreement or understanding between a cemetery authority and a cemetery worker's association which totally prohibits burials of human remains on Sundays or legal holidays shall be deemed to be void as against public policy and wholly unenforceable.

(b) Nothing in this Section shall prohibit a cemetery authority and a cemetery workers' association from entering into a contract, agreement or understanding which limits Sunday or holiday burials of human remains to decedents who are members of religious sects whose tenets or beliefs require burials within a specified period of time and whose deaths occurred at such times as to necessitate Sunday or holiday burials. Such contract, agreement or understanding may provide that the funeral director notify the cemetery authority within a reasonable time when a Sunday or holiday burial is necessitated by reason of the decedents religious tenets or beliefs.

(c) It shall be unlawful for any person to restrain, prohibit or interfere with the burial of a decedent whose time of death and religious tenets or beliefs necessitate burial on a Sunday or legal holiday.

(d) A violation of this Section is a Class A misdemeanor.

* * *

2. Any person agrieved by any conduct of a cemetery authority or cemetery worker's association which is prohibited by Section 1 may maintain an action in the circuit court of the county in which the violation occurred to enjoin any conduct in violation of that Section. The circuit court may enter an expedited order or temporary restraining order without notice and hearing to protect the rights of persons agrieved by such conduct in violation of Section 1 of this act.

USCA Const. Amend, First:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

USCA Const. Amend. Thirteen:

> "Involuntary servitude . . . shall [not] exist within the United States . . ."

USCA Const. Art. VI, Clause 2:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Lands, and the Judges in every State shall bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

29 USCA §151 (National Labor Relations Act 1935, retitled Labor Management Relations Act).

> "It is required to be the policy of the United States to eliminate the causes of substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (July 5, 1935, c-372 §1, 49 Stat. 449; June 23, 1947, c-120, Title I. §101, 61 Stat. 136).

USC 2000(e) (Sec. 703)(a)(1) of the Federal Equal Rights Act of 1964:

> "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . religion."

STATEMENT OF FACTS

Nature of the Case:

A collective bargaining agreement and understanding between a cemetery workers' union and an association of cemetery owners provides that the cemetery workers are not required to work on certain designated religious and national holidays (with specified exceptions for emergencies).

Illinois enacted a statute (pertinent provisions of which are quoted, supra) which declares the said collective bargaining agreement and understanding "void as against public policy and wholly unenforceable" in so far as such:

> ". . . contract, agreement or understanding between a cemetery authority and a cemetery workers' association . . . totally prohibits burials of human remains on Sundays or legal holidays . . ."

A pertinent provision of the Act declares it to be:

> ". . . unlawful for any person to restrain, prohibit or interfere with burial of a decedent whose time of death and religious tenets or beliefs necessitate burial on a Sunday or legal holiday."

Another provision makes a violation of the act by a cemetery worker refusing to make Sunday burials a "Class A" misdemeanor under the Illinois Criminal Code.

The cemetery owners threatened to fire any cemetery worker who refused to make burials on Sundays or holidays for the benefit of the particular religious group demanding same. Plaintiffs brought a class suit challenging the constitutionality of the Illinois statute.

The circuit judge granted leave to intervene by the Attorney General of Illinois on behalf of the People of Illi-

nois, and various interested parties, including orthodox Jewish religious societies and organizations. Intervenors were aligned with respondents.

The decisions below:

The circuit court sustained the constitutionality of the Act. It conceded however that the statute was "special legislation" for the "benefit of a particular group of citizenry [who] . . . have certain religious requirements." (Tr. 5/10/84)

Petitioners' motion for direct appeal to the Supreme Court of the State on grounds of public importance was denied. The court on its own motion directed an expedited disposition of the case by the Appellate Court. On September 17, 1984, two judges of the Appellate Court, First District, rendered their opinion sustaining validity of the State statutes (App. 1-11.)

On October 15, 1984 the third member of the Appellate panel filed his dissent contending that the Illinois act was contrary to numerous decisions of this Court, as well a violating the National Labor Relations Act. (App. 11)

HOW THE FEDERAL AND CONSTITUTIONAL QUESTIONS WERE PRESENTED AND PRESERVED

A timely PETITION FOR LEAVE TO APPEAL to the Supreme Court of Illinois pointed out several constitutional questions of critical importance presented by the complaint and the pleadings and which were incorrectly disposed of by the Appellate Court:

—That the State statute grossly violated the First Amendment's Establishment and Free Exercise Clauses because it expressly proclaimed a *religious* rather than a *secular* purpose;

—That the State act catered to the "religious requirements" of a special religious sect by mandating Sunday and holiday burials and thereby infringed on the "free exercise" religious and contract rights of the cemetery workers who preferred to observe Sundays or other religious holidays pursuant to *their* own religion.

—That the State act was not justified, or even rationalized, by any compelling State interest in terms of health or safety, but solely to "accommodate" the religious requirements" of a particular religious denomination;

—That the Illinois statute violates the Federal Equal Rights Act of 1964 in sacrificing the religious rights of the cemetery workers for the alleged "religious requirements" of a small Jewish ultra-orthodox group for whose benefit the Act obstensibly was adopted;

—That the Illinois statute impermissibly interferes with and dictates the terms of the collective bargaining agreement for the avowed purpose of insuring that members of a particular religious sect be permitted to bury their dead in accordance with their prescribed rituals, over the "concerted refusal" of the cemetery workers union, pursuant to their collective bargaining agreement, to work on Sundays and other religious and national holidays;

—That the Illinois act contravenes the Equal Protection Clause of the Fourteenth Amendment;

—That the Illinois statute breaches the Thirteenth Amendment of the Federal Constitution which forbids "involuntary servitude", by compelling members of the cemetery workers' union under threat of criminal penalties, to make burials on Sundays and other holidays, against their will and conscience;

—That the act violates the Due Process Clause of the Federal Constitution in providing for expedited temporary restraining orders without notice and hearing.

ARGUMENT

Prefatory Statement — Overview

For the reasons cogently stated in the dissenting opinion (App. 11-15), the majority of the Illinois Appellate Court seriously misapprehended the rulings of this Court with respect to the criteria under which a State statute may pass muster under the Establishment and Free Exercise Clause of the First Amendment.

The majority also have misapprehended that in enacting the National Labor Relations Act, Congress preempted the field of collective bargaining agreements; and the Illinois court erred in sustaining the statute as within the compass of activities which a State may regulate.

This Court in *McGowan* v. *Maryland*, 368 US 420, 6 L. Ed. 2d 393 (1961), sustained the right of a State, under its police power, to enforce Sunday closing laws. State Sunday closing laws, however, are not upheld on the basis that they reasonably accommodate those who observe the Sabbath on Sunday— a *religious* purpose—but solely on the ground that a State may have a compelling interest in setting aside "a day of rest and recreation"—a *secular* purpose *McGowan*, 366 U.S. at 449.

It is paradoxical, indeed ironic, that the State of Illinois in the instant Act mandates that cemetery workers *must* work on Sundays and make burials to accommodate the *religious* "requirements" of a special sect.

The "concerted refusal" of petitioners to make burials on Sundays (except in special circumstances dictated by public health, safety, etc.) is within the collective bargain-

ing contractual rights of the petitioner class. The no-Sunday-or holiday-burial provisions of the instant collective bargaining agreement, which petitioners seek to protect, and which the Act nullifies, in no way interferes with anyone's First Amendment right to the "free exercise" of religion. Respondents, or any members of the public are free to purchase burial lots in *non-union* cemeteries and to exercise their religious beliefs in any way they see fit.

A glaring constitutional defect in the instant Act is that it targets only cemetery workers and cemetery authorities having collective bargaining agreements relative to Sunday or holiday burials. The Act does not even aim to cover non-union worker/cemetery owner arrangements, which are not subject to collective bargaining agreements.

The fundamental right of "free exercise" of one's religion may not be imposed at the expense of the petitioner cemetery workers who have a right to observe their own Sabbath, or day of rest, and to enforce with their perfectly valid collective bargaining arrangement by "concerted refusal" to work on Sundays and holidays.

The delicate Church/State questions presented by the instant case, together with the supremacy of the National Labor Relations Act over the instant State Act, clearly merits review by this Court especially in a climate under which such questions are receiving close scrutiny and attention of the Court.

I.

THE ILLINOIS STATUTE CONTRAVENES BOTH THE "ESTABLISHMENT" AND "FREE EXERCISE" OF RELIGION CLAUSES OF THE FIRST AMENDMENT.

A. The act violates the Establishment Clause because it blatantly expresses a religious rather than a secular purpose of catering to the "religious requirements" of a special religious sect.

The Act in question is unconstitutional under the Establishment Clause because it was explicitly enacted for a religious purpose. It has the primary effect of aiding the religion of the beneficiaries of the Act. It inhibits the religious exercise of the unionized cemetery workers who prefer *not to work* on Sundays, or other religious holidays. And the statute is not justified by any compelling state interest.

The Establishment Clause prohibits a State from tailoring its laws to the principles of *any* religious sect, cult, or demonination. This Court has firmly ruled that the Establishment Clause mandates that:

> "Neither a State nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religious, nor prefer one religion over another... In the words of Jefferson, the clause against the establishment of religion by law was intended to erect 'a wall of separation between Church and State' " (*Everson* v. *Board of Education*, 300 U.S. 1, 15-16 (1947)).

The foregoing cardinal principle has been enunciated by this Court on numerous occasions and in various contexts: *Larson* v. *Valente*, 456 U.S. 228, 246 (1982); *Harris* v. *McRae*, 448 U.S. 297, 319 (1980); *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968); *School District of Abington* v.

Schempp, 374 U.S. 203, 216 (1963). The doctrine has not been abrogated by any subsequent decisions of this Court.

To preserve the "wall" separating Church and State, a statute may not have a purpose of primary effect of either advancing or inhibiting religion. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971); *Epperson* v. *Arkansas*, *supra* at 106; *School District of Abington* v. *Schempp*, *supra* at 222. To be permissible under the Establishment Clause, a statute must be used in a *religious neutral* manner for secular and non-demoninational purposes. *Larkin* v. *Grendel's Den*, 415 U.S. 116, 103 S.Ct. 505, 511 (1982). No recent decisions of this Court have departed from those principles.

In *Lemon* v. *Kurtzman*, *supra*, and *Committee for Public Education* v. *Nyquist*, 413 U.S. 745, 772-73, the Court enunciated a "three-pronged" test of constitutionality which a statute must pass under the Establishment Clause. The statute:

> "... first must reflect a *clearly secular purpose;* second, must have a primary effect that *neither advances nor inhibits* religion, and third must avoid excessive governmental entanglement with religion." (Emphasis added).

Moreover, in applying the foregoing threefold test to a statute challenged because of its religious content or overtones, the Court applies "*strict scrutiny*". The normal "presumption of legislative validity" is not operative. Here the majority of opinion of the Illinois Appellate Court failed to follow this rule. The Illinois Act in question flunks each and every one of this Court's tests for passing muster under the Establishment Clause.

In *Caldor* v. *Thornton, Inc.*, 191 Conn. 336, 464 A.2d 785 (1983), (cert. granted ..... U.S. ..... (1984), *sub judice*, current term) Connecticut enacted a so-called "Sabbath"

law which prohibited employers from dismissing any employee refusing to work on the employee's designated Sabbath. On its face the statute was well-intentioned, neutral and benevolent in that it purported to respect and accommodate the divers religions of *all* employees.[1]

Nevertheless, on application of the "three-pronged test", and under "strict scrutiny", the Connecticut Supreme Court in *Caldor* v. *Thornton* invalidated the Connecticut law as having a religious, rather than a secular purpose, and therefore breached the Establishment Clause.[2]

In *Epperson* v. *Arkansas, supra*, this Court struck down a seemingly neutral state statute prohibiting public schools from teaching the scientific theory of evolution. According to the Court, however, the real purpose of the statute was to preclude instruction of a theory that was contrary to the religious views of creation. In invalidating the Arkansas statute under the First Amendment (Fourteenth Amendment) the Court in *Epperson* declared:

> "[N]o suggestion has been made that Arkansas' law may be justified by considerations of State policy other than the religious views of some of its citizens.

---

[1] *Cf* remarks of dissenting opinion in the instant case:
"Undoubtedly our General Assembly acted with the best of motives in attempting to accommodate the religious beliefs of a group long subjected to so much discrimination. However, the flaw in the instant statute does not lie in the good intentions of its authors, but in its effects." (App. 14)

[2] At the writing of this Petition, the Court's review of *Caldor* is not yet announced. But, hypothetically, if the Supreme Court of Connecticut is reversed, the instant case is distinguishable in that it seeks to accommodate the religious purposes of only a particular sect or denomination rather than accommodate the "divers" religions of all employees" as the Connecticut statute attempted.

> It is clear that fundamental sectarian conviction was and is the law's reason for existence." (*ibid.* at 106)

Even if secular purposes are offered in justification of a state statute, the Court nevertheless will examine the nature of the activity involved to determine its constitutionality. In *Stone* v. *Graham*, 449 U.S. 39 (1981) the Court nullified a state statute requiring the Ten Commandments to be posted in public schools for the *avowed secular* purpose of promoting moral values, contradicting materialistic trends, perpetuating institutions and teaching history and literature. These avowed (and plausible) secular purposes were rejected by the Court on the ground that the "*pre-eminent* purpose was plainly religious in nature." (*ibid.* at 41) (Emphasis added)

In the case at hand, the Illinois statute in question does not pretend to be anything but "plainly religious in nature."

(1) *The three-part Lemon test of constitutionality under the Establishment Clause has been preserved, although expanded by this Court's decision in Lynch* v. *Donnelly, but a statute must have a "clearly secular purpose" which the Illinois Act does not have.*

Citing *Lynch* v. *Donnelly* ..... U.S. ..... 104 S.Ct. 1355 (1984), the majority of the Illinois Appellate Court concluded that:

> "The act in question has a valid secular purpose." (App. 5)

For the adequate reasons set forth in the dissenting opinion (App. 12-13), the majority have misapprehended this Court's holding in *Lynch* and have stretched the "clearly-secular-purpose" criterion to grotesque proportions.

In *Lynch* the Court sustained a Pawtuckett, Rhode Island ordinance providing for the display in a public park of

the Christmas Nativity Scene. The Court sustained the constitutionality of the ordinance on the finding that the display had a valid *secular* rather than a religious purpose. In reaching that result, the Court discussed the purpose and primary effect of the Rhode Island practice and concluded that it did not involve "excessive governmental entanglement in religious matters". (104 S.Ct. at 1362-5). This does not represent a departure, reversal, or abnegation of *Lemon,* or the great body of Establishment Clause decisions. The Court simply noted that although *Lemon* has often been useful in testing the constitutionality of State statutes touching upon religion, the Court's analysis is not confined to any *single* test.

Similarly in *Marsh* v. *Chambers,* ..... U.S..... 103 S.Ct. 3330 (1983), the Court recognized that the practice of "opening legislative sessions with prayer has become part of the fabric of our society." (103 St.Ct. at 3336). Although the Court embarked on a careful historical analysis, there was no repudiation or abandonment of the *Lemon* tri-part standard.

In the case at bar, it can hardly be claimed that Sunday burials have achieved such an ingrained position in our national history or culture. Indeed, Sunday burials are contrary to the general culture and fabric of our society, as well as the universal public policy of recognizing Sunday as a day of rest.

The conclusion of the majority of the Illinois Appellate Court that the instant Act "has a valid secular purpose" is purely *ipse dixit,* and is contradicted by the very terms of the statute. The Act's "pre-eminent purpose" is plainly and undisguisedly religious. On its face the Act has the purpose of aiding those religious groups which require Sunday or holiday burials, and indeed goes so far as to prefer those same religious groups over all other religions.

Structured to favor certain sects, the Act purports to validate any collective bargaining agreement limiting Sunday and holiday burials, *except* that such agreement or understanding is *illegal* insofar as it prohibits Sunday or holiday burials to "decedents who are members of religious sects whose tenets or beliefs require burials within a specified period of time and whose deaths occurred at such times as to necessitate Sunday or holiday burials."

A law which grants demoninational preferences—exactly what the instant act does—is unconstitutional "unless it is justified by a compelling governmental interest and unless it is clearly fitted to further that interest." *Larson* v. *Valente*, 456 U.S. 220 *supra* at 246-47. *Marsh* v. *Chambers*, *supra* ..... U.S. ....., 103 S.Ct. at 3340 nt. 11. Highlighting the blatant religious preference of the Act, is its attendant effect of inhibiting cemetary workers from observing Sundays or other holidays in accordance with their own religious beliefs. As if this were not enough, the Act goes so far as to punish cemetery workers refusing to work on Sunday or holidays by the drastic penalty of prosecution for a Class A misdemeanor. Rather than preserving constitutional neutrality, the State of Illinois, at the behest of certain ultra-orthodox Jewish religious groups, has become entwined in matters of religion, with the effect of favoring some religious sects over others.

The dissenting opinion of the Appellate Court aptly notes:

> "the Act in question does not require accommodation for all, but only for a few; it does not promote the principle of 'supremacy of conscience,' but only promotes the beliefs of certain religious groups" (App. 14).

What Judge Learned Hand said in *Otey* v. *Baltimore & Ohio RR Co.*, 205 F.2d 58, 61 (2d Cir., 1953) is aptly descriptive of the situation here:

> "The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in pursuit of their own interests, others must conform their conduct to his own religious necessities . . . we must accommodate our idiosyncrasies, religious as well as secular, to the comprises (compromises (?)] necessary to communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectation of a better world."

A State may justify regulation of religious activities to promote health, safety, the general welfare, or some other compelling state interest. *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963). Here, however, the Illinois statute does not even pretend to be enacted pursuant to the broad police powers of the State to accomplish the foregoing objectives. The thrust of the Act is to avoid all collective bargaining contracts or understandings that do not provide an exception for religious sects that "require" Sunday and holiday burials. In so doing the Illinois Act contravenes the principle of the First Amendment:

> "When a state intentionally sets up a system that by its essential nature serves a religious function, one can only conclude that the advancement of religion is the desired goal." *Florey* v. *Sioux Falls School Dist.*, 619 F. 2d 1311, 1315 (8 Cir. 1980) cert. den., 449 US 987 (1980)

(2) *The instant collective bargaining agreement providing for no burials on Sundays or holidays, which the Illinois Act outlaws, does not interfere with the "free exercise" of anyone's religion.*

The rationale of the Appellate Court's majority in sustaining the Act is contained in the following passage:

> "The record indicates that certain religious groups were required to conduct burials on Sundays or holi-

> days because of their religious beliefs and could not always act in accordance with their beliefs because under certain labor agreements, cemetery workers did not have to perform interments on those days. The Act eliminated the discriminating effects of the agreements." (App. 5-6)

This is a false and untenable justification. The courts below were invited to take judicial notice that many cemeteries in the Chicago area—indeed within the city itself—do not operate under a union shop agreement with petitioners' cemetery workers union. Petitioners do not have a "monoply" of the labor force in Chicago cemeteries. Whatever the rule in other cemeteries, workless Sundays and holidays are the union's agreement and understanding only with respect to those cemeteries with whom it has a collective bargaining arrangement.

Contrary to the conclusion of the appellate court majority, freedom to exercise religion by any group requiring burials on Sundays or other holidays is not abridged by petitioners. Even assuming that the Act was enacted in furtherance of a "Free Exercise" purpose, and that such legislation was permissible under the First Amendment, the fact is that any group requiring Sunday or holiday burials is *not* precluded from obtaining such burials. It simply may not obtain such service in cemeteries having collective bargaining agreements with petitioners.

Any group may avail itself of any number of cemeteries not bound by the instant collective bargaining agreement. Just as any religious group may build its own church, temple or synagogue, so also such a group may purchase its own cemetery or burial ground and "freely exercise" its religion as it sees fit.

The vice of the Illinois Act is that it unconstitutionally promotes the religious requirements of certain ultra-

orthodox Jewish groups by providing a *more convenient means* of practicing their beliefs. Such a rationale certainly cannot serve as a State's "compelling interest" for breaching the wall of neutrality between Church and State.

Some of the intervenors have, perhaps unconsciously, confessed in their pleadings that the Act has nothing but a religious rather than a secular purpose to promote or "enforce" "Jewish law" by means of the statute. Petitioners respectfully submit that the State of Illinois has no compelling interest "in enforcing" Jewish law, Catholic law, Protestant law, Moslem law, or the "law" of any other denomination.

B. The Illinois statute is unconstitutional under the Free Exercise Clause because it burdens religion of others and is not justified by any compelling State interest.

To demonstrate an infringement of the Free Exercise Clause, an individual must show "the coercive effect of the enactment as its operates against him in the practice of his religion." *School District of Abington* v. *Schempp, supra*, 374 U.S. at 223.

Here, petitioners submit that the Illinois Act has the effect of abridging their right to the free exercise of their religion. If such an infringement is found to exist, the State must demonstrate a compelling State interest that outweighs the burden of the free exercise by the group affected. *Wisconsin* v. *Yoder, supra*, 406 U.S. 214; *Sherbert* v. *Verner*, 374 U.S. 398 at 403.

In rejecting petitioners contention that the Act violates Sec. 703(a)(1) of the Civil Rights Act of 1964 (42 USCA 2000e-2(a)(1)), and violates their right of free exercise of religion, the majority of the Appellate Court states:

> "Initially, we note that no provision of the Act compels any cemetery workers to work on Sundays or

> holidays . . . there has not been any conflict with the religious beliefs of employees in the past and the Act as written does not present such conflicts. The scenario depicted by Plaintiffs that employees will be forced to work on those days is unfounded." (App. 9-10)

The foregoing assertion ignores the allegation of the complaint that any cemetery worker refusing to work on Sundays or holidays would be fired. The compulsions on petitioners to work on Sundays and holidays, although implied by the circumstances, are hard and present realities. The essence of the collective bargaining agreement, with which the Act interferes, is that the union requires a "concerted refusal" by its members not to make burials on Sundays and holidays. According to the Appellate Court, however, interments presumably can be accomplished either on a do-it-yourself basis, or by regular cemetery workers who are willing to do so—i.e. *non-union* workers.

If the union workers attempt to enforce their hard-won collective bargaining agreement that only union workers shall perform burials in cemeteries with whom they have a collective bargaining contract, they come within the criminal sanctions of the Act which make it:

> ". . . unlawful for any person to restrain, prohibit or interfere with the burial of a decedent whose time of death and religious tenets and beliefs necessitate burial on Sunday or a legal holiday." (Ill. Rev. Stat. Ch 21, par. 2, supra)

In short, contrary to the Illinois Appellate Court majority, the Act *does* compel union cemetery workers to work on Sundays and holidays—or suffer the consequences either of (1) being fired; (2) union busting; or (3) going to jail. Additionally, these compulsions infringe upon the fundamental religious beliefs held by those cemetery workers who observe Sunday as their own day of rest or worship.

Just as a State may not constitutionally require Sunday closing *solely* for religious purposes (*McGowan* v. *State of Maryland*, supra, 366 U.S. 420), neither may the State require individuals to work on Sundays contrary to their religious beliefs, absent some compelling State interest. (*United States* v. *Lee*, 455 U.S. 252 (1982); *Wisconsin* v. *Yoder*, supra; *Sherbert* v. *Verner*, supra.)

In *Sherbert*, the Court, in considering a State's denial of unemployment compensation benefits to a Sabbatarian who refused to work on Saturday on account of her religion, this Court said (374 U.S. at 404):

> "The ruling [disqualifying Mrs. Sherbert from benefits] *forces her* to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed for her Saturday worship." (Emphasis added).

The Illinois Act imposes the same Hobbesian choice upon petitioners. On the one hand a cemetery worker may follow his religious beliefs and forfeit his job, even suffer criminal sanctions, or the worker may abandon his religious beliefs and work on Sundays so that others may act in accordance with their religious tenets. Hence, the Act clearly burdens the free exercise of religion for some at the price of aiding the religious beliefs of others. Such infringements may be justified only by some overriding, compelling State interest.

What is that State interest? Here the Act does not purport even to be based upon the State's police power. It does not pretend to be a health, safety or welfare measure. No compelling State interest is shown. Rather, as above

argued, the statute clearly helps certain religious groups, and in violation of the Free Exercise Clause of the First Amendment.

As the dissenting opinion declares, invalidation of the Illinois statute would be consistent with the Court's duty of proclaiming the State's obligation of neutrality towards all religions.

II.

IN ENACTING THE NATIONAL LABOR RELATIONS ACT, CONGRESS PRE-EMPTED THE FIELD OF COLLECTIVE BARGAINING AGREEMENTS FREELY ENTERED INTO BETWEEN UNIONS AND EMPLOYERS. THE ILLINOIS STATUTE IS AN IMPERMISSIBLE VIOLATION OF THE UNION'S RIGHT TO BE FREE OF STATE GOVERNMENTAL DICTATES AS TO THE SUBSTANTIVE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, AND ENCROACHES UPON THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The Supremacy Clause, Article VI, Clause 2 commands:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

The national labor policies of the United States are embodied in the National Labor Relations Act of 1935 (NLRA) as amended in 1947, and retitled Labor Management Relations Act (LMRA) 29 USC §151. That national policy is explicitly stated:

> "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and

> eliminate these obstructions when they have occurred by encouraging the practice and procedure of all collective bargaining, and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Various attempts by State governments to interfere with the content of valid collective bargaining agreements have been struck down by this and lower federal courts on the ground that the federal statute pre-empts the field of collective bargaining agreements between labor organizations and employers. In *Lodge* 76, *International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 US 132 (1976), the State of Wisconsin held it to be an unfair labor practice under Wisconsin law for a labor union to refuse to work overtime. This Court in *Machinists* held that the union's "concerted refusal" to work overtime was peaceful conduct constituting activity that must be free of State regulation. *Cf.* refusal of petitioners to make burials on Sundays and holidays.

In *Local Union No.* 189, *Amalgamated Meat Cutter & Butcher Workmen of N. America, AFL-CIO* v. *Jewel Tea Co.*, 381 U.S. 676 (1964), this Court ruled that "union-employer agreements on *when*, as well as how long employees must work" were within the purview of the National Labor Relations Act, citing *Timken Roller Bearing Co.*, 70 NLRB 500, 504, 515-516, 521 (1946), rev'd on other grounds 161 F 2d 949 (CA 6th Cir. 1947) ("Employer's unilateral imposition of Sunday work was refusal to bargain") (381 U.S. at 691).

Under the holdings of *Machinests* and *Meat Cutters*, supra, even if an employer who is part of the collective bargaining process cannot be protected by a State regula-

tion when it claims "unfairness" in respect to an advantage which the union asserts, there is even less standing on the part of an outside, purely parochial religious group to invoke State interference with a perfectly valid collective bargaining agreement between the cemetery workers and the cemetery authorities that the members of the union will not work on Sundays or holidays, regardless of the alleged religious "requirements" of some special group.

If any member of the cemetery association, threatening the criminal sanctions of the Illinois Act, were to direct cemetery employees to make Sunday burials, such conduct would necessarily be an "unfair labor practice". In line with the holding in *Machinists*, a number of other decisions in this Court hold that a State may not impinge on conduct which is protected under Section 7 of the Act (29 U.S.C. §157), nor may a State sanction conduct which is prohibited as an unfair labor practice under Section 8 of the Act, (29 USC §158). See *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971); *Hanna Mining Co.* v. *Marine Engineers*, 382 US 181, 187; *San Diego Building Trades Council* v. *Garmon*, 359 US 236, 244-45.

State law may not interfere with rights which are only "implicitly" guaranteed by the NLRA, even though State conduct is not expressly prohibited, nor the activity specifically protected by the Act. What governs is the intent of Congress. Thus:

> "An appreciation of the true character of the national labor policy expressed in the NLRA and the LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition and laissez-faire in respect to union organization, collective bargaining, in labor disputes what would be upset, if a State could enforce statutes or rules of decision resting upon its views

concerning accommodation of the same interest." (Cox LABOR LAW PRE-EMPTION REVISITED, 85 Har. L. Rev. 1337, 1352 (1972) quoted as Ft. Nt. in *Machinists* supra, 427 U.S. at p. 138). (Emphasis added).

Although it is fundamental under the NLRA that the parties have a duty to bargain in "good faith", that obligation does not compel either party to agree to a proposal or *require the making of a concession . . .*" 29 USC §158(d) (Emphasis added). Accordingly, petitioners in the case at bar are not required to make any "concession" of their hard-won right pursuant to their collective bargaining agreement that no burials would be made on Sunday in cemeteries in which union members work.

In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 US 1 (1937) this Court held that the National Labor Relations Board was "without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." (301 U.S. at 45). See also *H. K. Porter Co.* v. *NLRB*, 397 US 99, 102.

By the same token an Illinois statute which pretends to be, "An Act to permit certain burials on Sunday and legal holidays and to permit certain conduct in relation thereto", is a raw attempt by the State of Illinois to dictate the terms of an otherwise valid collective bargaining agreement between the Union and the cemetery owners and to modify their no-burial-on-Sunday understanding.

CONCLUSION

Petitioners respectfully commend to this Court the remarks of the Appellate Court's dissenting opinion:

> "Undoubtedly our General Assembly acted with the best of motives in attempting to accommodate the religious beliefs of a group long subjected to so much discrimination. However, the flaw in the instant stat-

ute does not lie in the good intentions of its authors, but in its effects. In a pluralistic society, religious minorities of all persuasions are invariably hindered in the observance of their religions because they do not share the same customs and beliefs as those in the majority. Restaurants and grocery stores may not observe food preparation and storage restrictions required by many minority religions, religious holidays may not coincide with those of the majority, and, as the present case demonstrates, customs common to the majority may frustrate a minority religion's burial requirement. Remedial State action which is neutral and undertaken to permit greater accommodation for all religious belief addresses itself to these inherent problems and does not violate the establishment clause, for no particular religion is being advanced or inhibited by government. *Nottelson* v. *Smith Steel Workers* DALU 19806, AFL-CIO (7th Cir. 1981) 643 F. 2d 445, 454-55. (App. 14-15)

Further, as the dissenting opinion said:

"However, where government departs from this even-handed approach and attempts to tailor its laws in order to permit an accommodation for a particular religious group, the question necessarily arises why one group has been accommodated and not another. As the competing demands of other religious minorities for special accommodation arises, the State will inevitably be cast in the role of picking and choosing which minority religions are to receive favored treatment and which do not. The notion that such a spectacle represents a proper function of government is rejected by the establishment clause and the cases construing it. [citing *Abington School Dist.* v. *Schempp,* supra; *Engel* v. *Vitale* (supra) and *Everson* v. *Board of Education,* supra]." (App. 15).

For all of the foregoing reasons, petitioners respectfully pray that this Court grant their Petition For Writ of Certiorari.

Respectfully submitted,

Sidney Z. Karasik
100 West Monroe Street
Suite 911
Chicago, Illinois 60603
(312) 782-7285
Counsel of Record

APPENDIX

APPENDIX

Opinion of the Appellate Court.

No. 84-1480

MARTIN HECKMANN and EDWARD T. CAWLEY, individually and on behalf of Local 106, AFL-CIO Service Employees International Union, a labor organization of all cemetery workers members thereof,

Plaintiffs-Appellants,

v.

CEMETERIES ASSOCIATION OF GREATER CHICAGO, et al.,

Defendants-Appellees,

and

PEOPLE OF THE STATE OF ILLINOIS, ex rel. NEIL F. HARTIGAN, Attorney General, etc.,

Defendant-Intervenor,

MERKAZ HARABONIM-CHICAGO ORTHODOX RABBINATE, et al.

Defendants-Intervenors.

FIRST DIVISION September 17, 1984

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

HONORABLE ARTHUR L. DUNNE, PRESIDING.

JUSTICE McGLOON delivered the opinion of the court:

Plaintiffs filed a declaratory judgment action challenging the constitutionality and validity of "An Act to permit certain burials on Sundays and legal holidays***."

On appeal from an order granting defendants-intervenors' motion for summary judgment, plaintiffs contend: (1) the Act violates the Establishment Clause of the United States Constitution and and Article I, section 3 of the Illinois Constitution; (2) state action in the area of labor relations is preempted by federal law; (3) the Act violates the equal protection clauses of the United States and Illinois constitutions and the Illinois constitutional prohibition on special legislation; (4) their right of free exercise of religion guaranteed under the constitution and the Federal Civil Rights Act of 1964 is abridged by the Act; (5) the Act mandates involuntary servitude; (6) the Act violates due process; and (7) the obligations of contract are impaired by the Act.

We affirm.

The subject of this appeal is "An Act to permit certain burials on Sundays and legal holidays ***." (the Act) (Ill. Rev. Stat. 1983, ch. 21, par. 101 *et seq.*). The pertinent provisions of the Act provide.

> "1. (a) Every contract, agreement or understanding between a cemetery authority and a cemetery workers' association which totally prohibits burials of human remains on Sundays or legal holidays shall be deemed to be void as against public policy and wholly unenforceable.
>
> (b) Nothing in this Section shall prohibit a cemetery authority and a cemetery workers' association from entering into a contract, agreement or understanding which limits Sunday or holiday burials of human remains to decedents who were members of religious sects whose tenets or beliefs require burials within a specified period of time and whose deaths occurred at such times as to necessitate Sunday or holiday bur-

ials. Such contract, agreement or understanding may provide that a funeral director notify the cemetery authority within a reasonable time when a Sunday or holiday burial is necessitated by reason of the decedent's religious tenets or beliefs.

(c) It shall be unlawful for any person to restrain, prohibit or interfere with the burial of a decedent whose time of death and religious tenets or beliefs necessitate burial on a Sunday or legal holiday.

* * *

"2. Any person aggrieved by any conduct of a cemetery authority or cemetery workers' association which is prohibited by Section 1 may maintain an action in the circuit court of the county in which the violation occurred to enjoin any conduct in violation of that Section. The circuit court may enter an expedited order or temporary restraining order without notice and hearing to protect the rights of persons aggrieved by such conduct in violation of Section 1 of this Act." (Ill. Rev. Stat. 1983, ch. 21, pars. 101(a), 101(b), 101(c) and 102.)

Plaintiffs Martin Heckmann and Edward T. Cawley, elected representatives of Local 106, AFL-CIO Employees International Union, filed a class action on behalf of union members seeking to have the Act declared invalid and unconstitutional. The named defendants were Cemeteries Association of Greater Chicago, Inc., an association of approximately 30 cemetery owners and operators, and Robert Rothschild, director of the Association's labor committee. The State of Illinois, the Jewish Burial Society, the Jewish Sacred Society, Agudath Israel of Illinois, Merkaz Harabonim-Chicago Orthodix Rabbinate, Congregation Poalei Zedek, Maine Township Jewish Congregation, Con-

gregation Ezras Israel and Congregation Shaarei Tfiloh Bnai Reuven Nusach Hoari were granted leave to intervene.

Plaintiffs' complaint alleged that Rothschild, in his capacity as director of the labor committee and as operator of Evergreen Cemetery, told Cawley that after the effective date of the Act, any cemetery worker refusing to perform duties on Sundays or holidays would be fired. Under the collective bargaining agreement entered into by plaintiffs and the Association, the following holidays were designated workless holidays: New Year's Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, Christmas Day and the employee's birthday. The agreement further provided that no funeral services, interments, cremations or storages would be held on such holidays or Memorial Day except for cases where immediate burial was required by Board of Health regulations. Also, by custom and mutual understanding between cemetery workers and owners, no work is performed on Sunday, the day workers observe as their day of rest and religious holiday.

Plaintiffs' motion for judgment on the pleadings was denied and the trial court entered an order granting defendants-intervenors' motion for summary judgment. For the reasons advanced in the issues which follow, plaintiffs argue that the trial court erred in granting the motion for summary judgment. All of the issues raised on appeal were raised in plaintiffs' complaint.

First, plaintiffs contend the Act violates the Establishment Clause of the United States Constitution and Article 1, section 3 of the Illinois Constitution which prohibits preference to any religious denominations or mode of worship.

Generally, the Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment (*Everson* v. *Board of Education* (1946), 330

U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504), prohibits governmental sanctioning of the tenets of any and all religions. (*School District of Abington* v. *Schempp* (1963), 374 U.S. 203, 10 L.Ed.2d 844 83 S.Ct. 1560). Neither the states nor the federal government may pass laws which aid religion or prefer one religion over another. (*Everson.*) Nevertheless, statutes which confer benefits or give special recognition to religion in general or to one faith are not invalidated merely on that basis; rather, legislation must be examined to determine whether it establishes a religion or religious faith or tends to do so. *Lynch* v. *Donnelly* (1984), ... U.S. ....., ... L.Ed.2d ....., 104 S.Ct. 1355.

To defeat a challenge based on the Establishment Clause, a statute generally must satisfy three criteria: (1) the law must have a secular legislative purpose; (2) its principal effect must neither advance nor inhibit religion; and (3) the law must avoid excessive government entanglement with religion. (*Lynch; Larkin* v. *Grendel's Den, Inc.* (1982), 459 U.S. 116, 74 L.Ed.2d 297, 103 S.Ct. 505; *Lemon* v. *Kurtzman* (1971), 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105.) All the facts and circumstances of each case must be considered (*Lynch; Lemon*) and, at times, the three-part test set forth above has not been applied. In fact, in *Lynch,* the court noted that courts are not confined to any single test in this area. (..... U.S. ....., ... L.Ed.2d, ..., 104 S.Ct. 1362.) Regardless of the approach used in this case, we find that the Act does not violate the Establishment Clause.

The Act in question has a valid secular purpose. The record indicates that certain religious groups were required to conduct burials on Sundays or holidays because of their religious beliefs and could not always act in accordance with their beliefs because under certain labor agreements, cemetery workers did not have to perform interments on

those days. The Act eliminated the discriminating effect of the agreements. Statutes designed to eliminate even unintentional discrimination, and to accommodate religious beliefs are secular in purpose. (*Nottelson* v. *Smith Steel Workers, D.A.L.U.* 19806, *AFL-CIO* (7th Cir. 1981), 643 F.2d 445, 454, *U.S. cert. den.*, 454 U.S. 1046.) Furthermore, the Act does confer a benefit to one group to the exclusion of others, but relieves a burden on those who were unable to freely evercise their beliefs. It neither requires a particular religious affiliation or theological position nor inhibits the exercise of religious beliefs. Therefore, the Act meets the second criteria. (*Nottelson.*) Finally, we find that the statute does not foster excessive government entanglement with religion because government does not have to involve itself in any administration or planning and religion is not politicized. For these reasons, we reject plaintiffs' contention that the Act violates the Illinois constitutional provision prohibiting religious preferences.

Second, plantiffs contend that by enacting the National Labor Relations Act (NLRA) (29 USCA 151 *et seq.*), the federal government has preempted states' rights to regulate and restrict union collective bargaining processes. They maintain that the Act at issue in this case is unauthorized and prohibited legislation because it requires union members to relinquish their negotiated right to non-working Sundays and holidays, thereby interfering with the union's collective bargaining powers.

States cannot restrict labor rights guaranteed by federal law. (*Lodge 76, International Association of Machinists and Aero-space Workers, AFL-CIO* v. *Wisconsin Employment Relations Commission* (1976), 427 U.S. 132, 49 L.Ed.2d 396, 96 S.Ct. 2548.) However, federal labor policies are subordinate to First Amendment rights (*Nottelson*

v. *Smith Steel Workers D.A.L.U.* 19806, *AFL-CIO* (7th Cir., 1981), 643 F.2d 445) and a state may act to correct discriminatory practices within a union to accommodate religious beliefs of some union members. *Nottelson*, 643 F.2d, 450-51.

As noted previously in this opinion, the Act accomodates those who were unable to practice their beliefs because of the agreement and understanding that no burials would be made on Sundays and holidays. We have no doubt that Congress or the federal courts would not countenance a denial of First Amendment rights in order to enforce an agreement denying those rights. Just as the NLRA cannot shield an employer or union from making reasonable accomodations to the religious needs of employees, we believe the NLRA cannot be invoked to allow cemetery workers to deprive those whom they serve of their right to practice their religious beliefs.

Plaintiffs further contend that the Act violates the equal protection clauses of the United States Constitution and the Constitution of Illinois and the state prohibition of special legislation.

Special legislation is that which "confers a special benefit on exclusive privilege on a person or a group of persons to the exclusion of others similarly situated." (*Illinois Polygraph Society* v. *Pellicano* (1980), 83 Ill.2d 130, 137, 414 N.E.2d 458, 462.) However, a statute classifying persons does not violate the special legislation proscription if there is a reasonable basis for the classification and if the legislation bears a reasonable and proper relation to the purpose of the act and the evil sought to be remedied. (*Bridgewater* v. *Hotz* (1972), 51 Ill.2d 103, 281 N.E.2d 317.) A law need not affect every person or place in the state alike, but it must operate uniformly on all persons in like circum-

stances. *Youhas* v. *Ice* (1974), 56 Ill.2d 497, 309 N.E.2d 6; *People ex rel. Vermilion County Conservation District* v. *Lenover* (1969), 43 Ill.2d 209, 251 N.E.2d 175.

In view of the foregoing principles, we reject plaintiffs' argument that the Act arbitrarily conferred a special benefit on certain religious groups in violation of the special legislation clause. As pointed out previously in this opinion, the legislature sought to relieve a burden on those who had not been able to freely exercise their religious beliefs. The classification made in the Act was reasonably related to its purpose and the evil to be remedied.

Many of the principles applicable to the special legislation issue are also applicable to the equal protection question. These are that legislative classifications cannot be arbitrary and must be based on a national difference of condition or situation. Where the legislature concludes that reform is necessary, it may address itself to one stage of the problem and remedy it one step at a time. (*Illinois Coal Operators Association* v. *Pollution Control Board* (1974), 59 Ill.2d 305, 319 N.E.2d 782; *Youhas.*) However, as noted in *Illinois Polygraph Society*:

> "Special legislation differs from a violation of equal protection in that the latter consists of arbitrary and invidious discrimination *against* a person or a class of persons. It results from the governmental withholding of a right, privilege or benefit from a person or a class of persons without a reasonable basis (or, where a fundamental right or suspect classification is involved, a compelling State interest) for doing so. Whether a law is attacked as special legislation or as violation of equal protection, it is still the duty of the courts to decide whether the classification is unreasonable in that it preferentially and arbitrarily includes a class (special legislation) to the exclusion of all

> others, or improperly denies a benefit to a class (equal protection)." (*Citations omitted.*) (83 Ill.2d, 138 414 N.E.2d 462-63.)

Plaintiffs maintain that the Act violates equal protection because it applies only to agreements between union workers and cemetery associations and not to agreements between non-union workers and other cemeteries. However, the Act's targeting of labor association agreements and its provision declaring agreements which totally prohibit Sunday and holiday burials void may be justified on the legislature's belief that unions traditionally have been in a better position to negotiate such workless days. Thus, associations are generally responsible for the total ban on Sunday and holiday burials. Additionally, section 1(c) of the Act (Ill. Rev. Stat. 1983, ch. 21, par. 101(c) makes it unlawful for any person, not just labor association members, to restrain, prohibit or interfere with burials permitted under the Act. This section is general and treats all persons alike. We cannot say that the classification is arbitrary or that the legislature acted unreasonably in singling out workers' association agreements.

Fourth, plaintiffs contend the Act violates section 703(a)(1) of the Civil Rights Act of 1964 (42 USCA 2000e-2(a)(1)) and abridges their right of free exercise of religion. Each contention is based on plaintiffs' belief that the statute requires and compels all cemetery employees to work on Sundays and holidays under penalty of criminal sanctions. They further maintain that statutory mandate violates the rights of those workers whose religious beliefs do not allow work on Sundays or religious holidays.

Initially, we note that no provision of the Act compels any cemetery worker to work on Sundays or holidays. Its provisions only extend to voiding contracts totally prohibit-

ing burials on all Sundays and holidays and to interferences with burials conducted on those days. Furthermore, depositions in the record indicate that Sunday burials had been conducted in the past and that cemeteries had no difficulty recruiting workers willing to perform the services. There has not been any conflict with the religious beliefs of employees in the past and the Act as written does not present such conflicts. The scenario depicted by plaintiffs that employees will be forced to work on these days is unfounded.

Plaintiffs' fifth contention is that the Act violates the federal constitutional prohibition of involuntary servitude because it compels employees to work. Because of our finding that the Act does not require any employee to work against his will, we reject plaintiffs' argument.

Sixth, plaintiffs contend that section 2 of the Act (Ill. Rev. Stat. 1983, ch. 21, par. 102), which permits the issuance of a temporary restraining order without notice, violates due process. However, this section of the Act does not allow an order to issue in all circumstances. It states that the circuit court *may* enter the order to protect rights of those aggrieved. The general rules pertaining to issuing temporary restraining orders found in the Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 11-101) remain applicable and plaintiffs have not argued that this section of the Code is unconstitutional. Plaintiffs have misconstrued the provision of the Act and we find their contention to be without merit.

Finally, plaintiffs contend the Act abridges their freedom to contract and violates the federal and state constitutional prohibition against the impairment of contractual obligations.

The Contract Clause limits a state's power to regulate contracts between private parties, but the prohibition is not absolute. (*United States Trust Co. of New York* v. *New Jersey* (1977), 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505; *Meegan* v. *Village of Tinley Park* (1972), 52 Ill. 2d 354, 288 N.E.2d 423.) Rights granted by contract are subject to reasonable regulatory actions by the state designed to secure the welfare of the community. (*Meegan.*) We believe the legislation in issue does not offend the constiutions' contract clauses. Its provisions are narrowly drawn to permit the free exercise of religious rights while allowing labor to restrict their working schedules accordingly. It is, as noted above, a reasonable exercise of legislative authority in an area of legitimate legislative concern.

For the foregoing reasons, the order of the circuit court of Cook County is affirmed.

ORDER AFFIRMED.

O'CONNOR, J., concurs.

BUCKLEY, P.J., dissenting:

PRESIDING JUSTICE BUCKLEY, dissenting:

I respectfully dissent from the decision of my colleagues because I believe the statute in question violates the establishment clause of the first amendment. The present case raises the issue of whether government may dictate the terms of a collective bargaining agreement through legislative enactment for the avowed purpose of ensuring that members of a particular religious sect or sects will be permitted to bury their dead in accordance with their prescribed rituals. Such governmental action designed to accommodate the needs of a particular religious minority must, of necessity, run afoul of the central purpose of the

establishment clause—the purpose of ensuring governmental neutrality in matters of religion. *Gillette* v. *United States* (1971), 401 U.S. 437, 450-51, 28 L. Ed. 2d 168, 180-81, 91 S. Ct. 828, 836.

The majority improperly relies on *Lynch* v. *Donnelly* (1984), ... U.S. ....., ... L. Ed. 2d ....., 104 S. Ct. 1355, for the proposition that "statutes which confer benefits or give special recognition to religion in general or to one faith are not invalidated merely on that basis." (Slip op. at 5.) *Lynch* concerned an establishment clause challenge to the erection of a Christmas display by the city of Pawtucket, Rhode Island which featured a nativity scene or crèche. In upholding the right of the city to include a crèche in its *Christmas display*, the Supreme Court noted:

> "The Court has made it abundantly clear, however, that 'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.' [Citations omitted.] Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." (..... U.S. at ....., ... L. Ed. 2d at ....., 104 S. Ct. at 1364.)

Thus, the Supreme Court recognized that government action which confers only "indirect," "remote," or "incidental" benefits on a given religion may still be constitutionally permissible under the establishment clause.

The instant statute inserts the power and authority of the State of Illinois into the collective bargaining process

for the direct and explicit benefit of a given religious minority. Surely, such action cannot be properly characterized as "incidentally," "remotely," or "indirectly" benefitting religion. Accordingly, *Lynch* is not controlling. Prior Supreme Court decisions forbidding governmental favoritism toward the adherents of any sect or religious organization require invalidation of this statute. *Abington School District* v. *Schempp* (1963), 374 U.S. 203, 216, 10 L. Ed. 2d 844, 854, 83 S. Ct. 1560, 1567-68; *Engel* v. *Vitale* (1962), 370 U.S. 421, 430-31, 8 L. Ed. 2d 601, 607-08, 82 S. Ct. 1261, 1266-67; *Everson* v. *Board of Education* (1946), 330 U.S. 1, 15-16, 91 L. Ed. 711, 723, 67 S. Ct. 504, 511.

I also disagree with the majority's assertion that the "Act in question has a valid secular purpose" because it was designed to eliminate discrimination and to accommodate religious belief. (Slip op. at 6.) The case relied upon by the majority in support of this conclusion, *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806, AFL-CIO* (7th Cir. 1981), 643 F.2d 445, involved an establishment clause challenge to section 701(j) of the Civil Rights Act of 1964, as amended (42 U.S.C.A. §2000e(j)). Section 701(j) forbids both employers and unions from discrimating against any individual because of his religious affiliation and required both to make reasonable accommodation for an employee's religiously motivated conduct or to show that to do so would work an undue hardship. In upholding section 701(j) the federal court found a valid secular purpose, explicitly noting that:

> "Application of Section 701(j) does not, as defendants contend, have a primary effect of advancing the interests of religionists over non-religionists or the beliefs of one sect over those of another." (643 F.2d 445, 454.)

and further that:

> "The fact that some religions may have more or different kinds of religiously dictated observances than other religions does not invalidate a law that applies to all faiths equally." (643 F.2d 445, 455.)

The court concluded that since section 701(j) required accommodation for all religiously motivated conduct, it promoted only the "principle of supremacy of conscience" and was therefore compatible with the establishment clause. (643 F.2d 445, 454-55.) In the present case, the Act in question does not require accommodation for all, but only for a few; it does not promote the "principle of supremacy of conscience" but only promotes the beliefs of certain religious groups. Accordingly, the majority's reliance on *Nottelson* in attempting to articulate a secular purpose is misplaced.

Undoubtedly, our General Assembly acted with the best of motives in attempting to accommodate the religious beliefs of a group long subjected to so much discrimination. However, the flaw in the instant statute does not lie in the good intentions of its authors but in its effects. In a pluralistic society, religious minorities of all persuasions are invariably hindered in the observance of their religions because they do not share the same customs and beliefs as those in the majority. Restaurants and grocery stores may not observe food preparation and storage restrictions required by many minority religions, religious holidays may not coincide with those of the majority and, as the present case demonstrates, customs common to the majority may frustrate a minority religion's burial requirements. Remedial state action which is neutral and undertaken to permit greater accommodation for all religious belief addresses itself to these inherent problems and does

not violate the establishment clause, for no particular religion is being advanced or inhibited by government. *Nottelson* v. *Smith Steel Workers D.A.L.U.* 19806, *AFL-CIO* (7th Cir. 1981), 643 F.2d 445, 454-55.

However, where government departs from this even-handed approach and attempts to tailor its laws in order to permit an accommodation for a particular religious group, the question necessarily arises why one group has been accommodated and not another. As the competing demands of other religious minorities for special accommodation arise, the state will inevitably be cast in the role of picking and choosing which minority religions are to receive favored treatment and which are not. The notion that such a spectacle represents a proper function of government is rejected by the establishment clause and the cases construing it. (*Abington School District* v. *Schempp* (1963), 374 U.S. 203, 216, 10 L. Ed. 2d 844, 854, 83 S. Ct. 1560, 1567-68; *Engel* v. *Vitale* (1962), 370 U.S. 421, 430-31, 8 L. Ed. 2d 601, 607-08, 82 S. Ct. 1261, 1266-67; *Everson* v. *Board of Education* (1946), 330 U.S. 1, 15-16, 91 L. Ed. 2d 711, 723, 67 S. Ct. 504, 511.) Accordingly, I would hold that the instant statute is violative of the establishment clause and would reverse the judgment of the trial court.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
Springfield, Ill. 62706
(217) 782-2035

November 30, 1984

Mr. Sidney Z. Karaski
Attorney at Law
100 W. Monroe, S #911
Chicago, IL 60603

No. 60946—Martin Heckmann, et al., etc., petitioners, v. Cemeteries Association of Greater Chicago, et al., etc., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 21, 1984.

No. 60946

IN THE
SUPREME COURT OF ILLINOIS

Martin Heckmann, et al.,

Petitioners

v.

Cemeteries Association of Greater Chicago, et al.,

Respondents

Appeal from Appellate Court First District
1-84-1480
83-L-52647

ORDER

This matter has come for consideration upon the motion of petitioners to recall and stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is recalled and stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

FILED Jan 16 1985

Supreme Court Clerk